

**Letter of Findings Number: 07-0606
Sales and Use Tax
For the Tax Years 2004-2006**

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-7-5; IC § 6-2.5-7-9; IC § 6-8.1-5-1.

Taxpayer protests the assessment of sales tax on gasoline.

II. Tax Administration—Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

II. Tax Administration—Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of a ten (10) percent negligence penalty.

STATEMENT OF FACTS

Taxpayer owns and operates a convenience store and gas station in Indiana. Taxpayer purchased gasoline from a distributor ("supplier"), which withdrew payments from Taxpayer's bank account by electronic funds transfer on an as-needed basis as the gasoline was delivered. Taxpayer prepaid sales tax on the gasoline purchases via these withdrawals. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed additional sales and use tax and assessed a negligence penalty for the tax years 2004, 2005, and 2006. Taxpayer protested this imposition of the tax, interest, and penalty. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Imposition.

DISCUSSION

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Under IC § 6-2.5-7-9, a retail merchant of gasoline has a duty to make a prepayment of the sales tax to the distributor or supplier of its gasoline. Pursuant to IC § 6-2.5-7-5, a retail merchant of gasoline from a metered pump has a duty to report and remit the amount of sales tax due on its gross receipts of gasoline regardless of the amount of tax collected for those sales, but the retail merchant is allowed to take a credit for the amount of sales tax it has prepaid under IC § 6-2.5-7-9.

The Department found that additional sales tax was due for Taxpayer's remitting prepaid sales tax to its gasoline supplier in incorrect amounts, for Taxpayer's reporting more prepaid sales tax credits than were due, and for Taxpayer's failure to take into account a refund of prepaid sales tax that Taxpayer received from its gasoline supplier.

Taxpayer asserts that it should have no further liability for the sales tax due on its gasoline sales because it prepaid sales tax to its supplier. However, IC § 6-2.5-7-5 only provides a credit to the retail merchant for the amount of tax that the retail merchant has prepaid to its gasoline distributor or supplier. The retail merchant's duty to report and remit the appropriate amount of sales tax remains after the retail merchant has made prepayments. The Department gave the Taxpayer credit for all the sales tax prepayments that were made to the gasoline supplier except those that were later refunded to the Taxpayer.

In addition, Taxpayer asserts that no portion of the \$59,151.45 that it received, in an electronic transfer back from its supplier, was for a refund of its prepaid sales tax. Taxpayer asserts that the \$59,151.45, it received from its supplier, represented a settlement to resolve a dispute between the Taxpayer and the supplier for the amount of money the supplier had withdrawn from Taxpayer's bank account to pay for the gasoline.

During the course of the protest, Taxpayer submitted a bank statement showing the \$59,151.45 payment from the supplier and "ledger sheets" purporting to show a \$9,035 overpayment to supplier. Taxpayer also submitted the court documents that Taxpayer filed to initiate a law suit against its supplier to demonstrate that the \$59,151.45 payment it received from the supplier was not a refund of prepaid sales tax. However, the information submitted is insufficient to establish that Taxpayer did not receive a refund of prepaid sales tax from its supplier. Based upon the evidence presented, the Department is unable to conclude that Taxpayer did not receive a refund of prepaid sales tax. Therefore, Taxpayer has not met the burden imposed by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration—Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protests the imposition of interest.

The Department refers to IC § 6-8.1-10-1(a) which provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Moreover, pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest.

Thus, Taxpayer's protest, to the extent that it is requesting a general waiver of interest, is denied.

However, for the time period between when Taxpayer prepaid the sales tax to its supplier to when the sales tax was refunded to Taxpayer, Taxpayer would not be requesting a waiver of interest. The issue is a question of when Taxpayer's liability to remit the \$59,145.05 of refunded prepaid sales tax arose. Since Taxpayer's liability for the refunded prepaid sales tax did not arise until the Taxpayer was refunded the prepaid sales tax on December 12, 2006, interest would not start to accrue until the due date for the sales tax return for Taxpayer's December 2006 transactions to be reported and the tax remitted.

Therefore, Taxpayer's protest, to the extent that interest has been assessed on the \$59,145.05 of refunded prepaid sales tax for the time period before the due date of the return on which the sales tax for December 2006 transactions—including the refunded prepaid sales tax—were to be remitted to the Department, is sustained in part subject to the findings of a supplemental audit.

FINDING

Taxpayer's protest is sustained in part and denied in part.

III. Tax Administration—Negligence Penalty.**DISCUSSION**

The Department issued proposed assessments and ten (10) percent negligence penalties for the tax years in question. Taxpayer protests the imposition of the penalties. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides "if a person... incurs, upon examination by the department, a deficiency that is due to negligence... the person is subject to a penalty."

The Department refers to [45 IAC 15-11-2\(b\)](#), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2\(c\)](#), as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has provided sufficient information to establish that its failure to pay the deficiency was not due to Taxpayer's negligence, but was due to reasonable cause as required by [45 IAC 15-11-2\(c\)](#).

FINDING

Taxpayer's protest to the imposition of the penalty is sustained.

CONCLUSION

In summary, Taxpayer's protest of the assessment of sales tax is denied. Taxpayer's protest, to the extent that interest has been assessed on the \$59,145.05 of refunded prepaid sales tax for the time period before the due date of the return on which the refunded prepaid sales tax was to be remitted to the Department, is sustained in part subject to the findings of a supplemental audit. Taxpayer's protest to the imposition of penalty is sustained.

